

# ARKANSAS SUPREME COURT

No. CR 08-1397

XAVIER REDUS  
Appellant

v.

STATE OF ARKANSAS  
Appellee

Opinion Delivered February 26, 2009

PRO SE MOTION FOR COPY OF  
RECORD [CIRCUIT COURT OF  
PULASKI COUNTY, CR 2005-856,  
HON. CHRIS PIAZZA, JUDGE]

APPEAL DISMISSED; MOTION  
MOOT.

## PER CURIAM

On July 5, 2005, judgment was entered reflecting that appellant Xavier Redus had entered a plea of guilty to multiple counts of aggravated robbery and theft of property. He was sentenced as a habitual offender to an aggregate term of 336 months' imprisonment.

On July 31, 2008, more than three years after the judgment was entered, appellant filed in the trial court a pro se petition to vacate the judgment pursuant to Arkansas Rule of Civil Procedure 60. The petition was denied on the grounds that it was not timely filed. Appellant lodged an appeal from the order in this court and now seeks a copy of the record to prepare the appellant's brief.

As the trial court did not err when it denied the petition, the appeal is dismissed. The motion is moot. This court has consistently held that an appeal from the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (per curiam); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (per curiam); *Harris v. State*, 318 Ark. 599, 887 S.W.2d

514 (1994) (per curiam); *Reed v. State*, 317 Ark. 286, 878 S.W.2d 376 (1994) (per curiam).

While Arkansas Rule of Civil Procedure 60(a) allows for a circuit court to modify or vacate a judgment, order, or decree, within ninety days of its having been filed with the clerk, we have emphatically stated that Rule 60(a) does not apply to criminal proceedings. *Ibsen v. Plegge*, 341 Ark. 225, 15 S.W.3d 686 (2000). Nor have we allowed for the application of Arkansas Rule of Civil Procedure 60(c), which allows a court to set aside a judgment more than ninety days after the entry of judgment. *See McArty v. State*, 364 Ark. 517, 221 S.W.3d 332 (2006); *Ibsen v. Plegge*, *supra*.

It may be that appellant elected to utilize Rule 60 as a means to circumvent the time limitations for filing a petition imposed by our postconviction rule, Arkansas Rule of Criminal Procedure 37.1, which provides that petitions under the rule must be filed in the trial court within ninety days of the date the judgment of conviction was entered on a plea of guilty. Ark. R. Crim. P. 37.2 (c). If so, Rule 60 is not substitute for a timely petition under Rule 37.1.

Appeal dismissed; motion moot.